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No. 79-157

In the Supreme Court of the United States

OCTOBER TERM, 1978

ORIGINAL COSMETICS PRODUCTS, INC., AND LOVE SONG COSMETICS CORP., PETITIONERS

v.

JOHN STRACHAN, POSTMASTER AT NEW YORK CITY, NEW YORK, AND UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not reported. The opinion of the district court (Pet. App. 6a-10a) is reported at 459 F. Supp. 496.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1979. The petition for a writ of certiorari was filed on Monday, July 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the First Amendment permits application of the substantial evidence standard in judicial review of administrative determinations under 39 U.S.C. 3005.

2. Whether the United States Postal Service had substantial evidence to conclude that petitioners engaged in a scheme for obtaining money through the mails by means of false representations.

3. Whether procedures under 39 U.S.C. 3005 for the prevention of false advertising through the mails are constitutional.

STATEMENT

1. In November 1975, the United States Postal Service commenced an administrative proceeding against petitioners under 39 U.S.C. 3005.[1] The Postal Service complaint charged that petitioners had advertised nine products variously as aphrodisiacs and sexual stimulants in a materially false manner (Pet. App. 12a-14a). An administrative hearing was held on February 18, 1976. The Postal Service introduced testimony in support of the charges from a postal inspector and from a urologist at

[1] 39 U.S.C. 3005 provides in pertinent part:

> (a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations * * *, the Postal Service may issue an order which—
>
> > (1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and
> >
> > (2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note.

New York University School of Medicine. Petitioners offered contrary testimony from their corporate president and from a urologist at New York Medical College (*id.* at 21a-23a, 43a). The administrative law judge sustained the complaint (*id.* 11a-27a, at 43a-44a).

Petitioners appealed this decision to a judicial officer of the Postal Service. The judicial officer sustained the decision and issued a remedial order to the postmaster at New York, New York, pursuant to 39 U.S.C. 3005 (Pet. App. 28a-36a). The order prohibited the payment of Postal Service money orders for the nine products in issue and directed the return of all mail addressed to petitioners that related to the deceptive scheme. The postmaster was directed to determine the relationship of mail to the scheme "by reference to the face of its wrapper" (*id.* at 36a). The order also required the postmaster to hold petitioners' mail for at least 48 hours to permit petitioners to examine the retained mail in the presence of the postmaster or a designated Postal Service employee and to release any mail (a) not connected with the scheme or (b) requesting a refund or returning merchandise connected with the scheme (*id.* at 35a-36a).

A supplemental order of August 25, 1976, modified the remedial order by directing that mail addressed to petitioners that is related to the deceptive scheme be detained by the postmaster rather than returned to the sender. The order provided that mail containing orders for products in addition to those that had been advertised deceptively was to be delivered to petitioners on the condition that they reimburse the customer for any orders for the nine products that were advertised deceptively (Pet. App. 37a-38a).

2. The district court, acting on the recommendation of the United States Magistrate (Pet. App. 41a-58a), upheld

the administrative determination and order (*id.* at 6a-10a). The court of appeals affirmed (*id.* at 1a-5a). The court of appeals held that 39 U.S.C. 3005 is constitutional, noting that "untruthful speech" is not protected by the First Amendment (Pet. App. 2a-3a). The court also determined that the record contained substantial evidence from informed medical opinion to support the decision of the Postal Service that petitioners' advertising claims were false. It rejected petitioners' contention that the absence of scientific tests was fatal to the administrative decision (*id.* at 3a-5a).

ARGUMENT

1. Petitioners argue (Pet. 7-9) that the court of appeals erred by construing 39 U.S.C. 3005 to confine judicial review of stop-mail orders to a determination of whether the decision of the Postal Service is supported by substantial evidence. Petitioners maintain that application of the substantial evidence standard in this case violates the First Amendment. These contentions are insubstantial.

39 U.S.C. 3005(a) authorizes the administrative action taken in this case "[u]pon evidence satisfactory to the Postal Service." Under this statute, petitioners are entitled to judicial review only to determine whether there is substantial evidence to support the administrative decision. *Leach* v. *Carlile*, 258 U.S. 138, 139-140 (1922); *National Conference on Legalizing Lotteries, Inc.* v. *Farley*, 96 F. 2d 861, 864 (D.C. Cir.), cert. denied, 305 U.S. 624 (1938).

The application of this standard of judicial review to administrative findings of commercial fraud is not unconstitutional. The constitutionality of 39 U.S.C. 3005 is well-established. This Court has, on several occasions,

upheld Postal Service proceedings under this statute against the contention that the statute violates the First and Fifth Amendments. *Lynch* v. *Blount*, 330 F. Supp. 689 (S.D.N.Y. 1971) (three-judge court), aff'd, 404 U.S. 1007 (1972); *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178 (1948); *Public Clearing House* v. *Coyne*, 194 U.S. 497 (1904). In sustaining this regulatory scheme against constitutional attack in *Lynch* v. *Blount*, *supra*, the district court correctly observed that the procedural protections afforded under the Constitution to other forms of speech "are wholly inappropriate, unnecessary and inapplicable to the field of commercial fraud." 330 F. Supp. at 694.

Nothing in this Court's decisions subsequent to *Lynch* has enlarged the procedural rights of advertisers who have been charged with commercial fraud. In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)—which concerned the question "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity," *id.* at 773—the Court did not suggest that the regulation of false advertising must meet the standards applicable to protected forms of speech. Indeed, the Court specifically recognized that false or misleading commercial speech is not "protected for its own sake" by the First Amendment. 425 U.S. at 771-772 & n.24.[2] The court of appeals was thus correct in

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[2]Petitioners' reliance (Pet. 8-9) on *Addington* v. *Texas*, No. 77-5992 (Apr. 30, 1979), which requires proof by more than the preponderance of the evidence in civil commitment proceedings involving individual liberty, is totally misplaced. The administrative order in this case is designed solely to curtail unlawful use of the mails. It imposed no incarceration, fine or other penalty for petitioners' unlawful conduct.

concluding (Pet. App. 2a) that the substantial evidence test is not unconstitutional as applied to the review of agency fact findings involving "[g]ood old-fashioned schemes to defraud." *Lynch* v. *Blount*, *supra*, 330 F. Supp. at 695.[3]

2. Petitioners contend (Pet. 9-11) that the evidence in the record does not support the Postal Service decision. The issues presented in the administrative proceeding were (1) whether petitioners represented their products as effective aphrodisiacs or sexual stimulants and (2) if so, whether this representation was false. The first issue was concededly properly determined adversely to petitioners and is not at issue here.[4] The administrative determination on the second issue simply gave greater weight to the evidence proffered by the Postal Service than by the petitioners.

The expert witness for the Postal Service testified that none of the ingredients in petitioners' products, as marketed, is inherently effective as a sexual stimulant. This testimony was founded on acknowledged medical

[3]For example, the Postal Service observed that petitioners sold common variety red pepper as "Imitation Spanish Fly" for $5.95 per 24 tablet bottle (Pet. App. 9a).

[4]Indeed, the fact that these representations were made is clear from the face of petitioners' advertisements that are attached to the administrative complaint (Pet. App. 12a-14a). Petitioners contend (Pet. 10) that the magistrate's use of a third brochure that was not attached to the administrative complaint violates the Due Process Clause. This contention is insubstantial. Administrative pleadings are accorded liberal amendment to conform to proof. *National Realty & Construction Co.* v. *Occupational Safety and Health Review Commission*, 489 F. 2d 1257, 1264 (D.C. Cir. 1973); 1. K. Davis, *Administrative Law Treatise* § 8.04, at 523 (1958). The brochure in question was introduced in evidence at the administrative hearing without objection by petitioners (Feb. 18, 1976, Admin. Tr. 7-10).

and pharmacological texts (Pet. App. 54a-55a).[5] In contrast, petitioners offered no evidence that their products were potent or scientifically formulated. Instead, they presented expert testimony to the effect that scientific tests should be conducted to determine whether or not the products would produce the results represented (*id.* at 23a, 56a). But, as the court of appeals observed (*id.* at 4a), this Court has expressly rejected the contention that tests are necessary when, as here, there is a reputable body of medical opinion that has concluded that the representations made by the advertisement are false. *Reilly* v. *Pinkus*, 338 U.S. 269, 274 (1949).[6]

[5]The government's expert, Dr. Hotchkiss, had treated more than 2,000 patients for sexual dysfunctions (Pet. App. 54a). In addition to his medical experience, he relied upon the U.S. Dispensary and the U.S. Pharmacopeia in concluding that the materials contained in "Jungle Passion Caps" (red pepper), "Spanish Fly Imitation Tablets" (red pepper), and "All American Booster Caps" (caffeine) had little or no efficacy as a sexual stimulant (Pet. App. 53a-56a). Moreover, petitioners, in their advertisements, praised the items for "the placebo qualities" they possessed, thereby admitting their lack of intrinsic value. The magistrate was entitled to conclude (Pet. App. 48a) that, to the uninitiated, this oblique reference to the product's lack of utility was insufficient to "dispel the general impression [made by the advertisement] that the product will aid the buyer's sex life."

[6]*American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902), on which petitioners rely (Pet. 9), is inapposite. In that case, the Court held that medical opinion alone could not establish that a particular method of treatment was ineffective and its advocacy thus fraudulent. As the Court explained in *Leach* v. *Carlile*, 258 U.S. 138, 139 (1922), however, medical opinion may be relied on by itself for the purpose of demonstrating "not that the substance which appellant was selling was entirely worthless as a medicine * * * but that it was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpetrating a fraud upon the public." As the courts below concluded, the substances advertised by petitioners (*e.g.*, wintergreen, red pepper, caffeine) plainly were not a "panacea" for the problems to which they were addressed.

3. Petitioners' remaining constitutional arguments have no merit. Their contention (Pet. 11) that 39 U.S.C. 3005 requires the Postal Service to open petitioners' mail without a warrant is unsupported. The statute confers no such authority on the Postal Service. To the contrary, the administrative order requires the Postal Service to determine the relationship of mail to the unlawful scheme "by reference to the face of its wrapper" (Pet. App. 36a). The order requires the Postal Service to detain the mail for at least 48 hours so that petitioners may examine the mail and receive it if it is unrelated to the unlawful scheme. Any other determinations are to be made according to the "outside of the mail" (Pet. App. 36a). Petitioners do not allege that any of their mail actually has been opened by the Postal Service under the order (Pet. 11). Their contention that the statute and order violate the Fourth Amendment is thus entirely groundless.

Petitioners claim (Pet. 13) that the stop-mail order chills even truthful advertising in violation of the First Amendment. But this contention ignores the fact that the stop-mail order is limited to mail and money order activity that is related to the false representation scheme (Pet. App. 35a-38a). The power of the government to regulate untruthful commerical speech in this fashion is not subject to dispute. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra.*

Petitioners also contend (Pet. 13) that the narrower remedy of a cease and desist order would be an adequate cure for false representation schemes and that the stop-mail order is therefore overly broad in violation of the

First and Fifth Amendments.[7] Petitioners' reference to overbreadth analysis is misplaced because, as is apparent from the order itself (Pet. App. 35a-38a), the order applies only to mail that is related to petitioners' unlawful activity. The stop-mail order thus regulates the same unlawful subject matter that a cease and desist order would, but it does so more effectively. It is not unconstitutional simply because it is the most effective means of curbing petitioners' unlawful conduct. The order does not interfere with or chill the exercise of lawful protected speech.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] 39 U.S.C. 3005 confers no power on the Postal Service to issue cease and desist orders.

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